(2)

Supreme Court, U.S.
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No. 95-1935
In the Supreme Court of the United States
October Term, 1995

MARY GLOVER, et al,

Petitioners,

v.

KENNETH McGINNIS, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHERE THERE HAS BEEN NO SHOWING OF ANY INDIVIDUAL OR WIDESPREAD ACTUAL INJURY TO THE INMATES' ABILITY TO ATTACK THEIR SENTENCES OR CHALLENGE THE CONDITIONS OF THEIR CONFINEMENT, IS THE MICHIGAN DEPARTMENT OF CORRECTIONS REQUIRED BY THE CONSTITUTION TO PROVIDE LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS?

II.

CAN RESPONDENTS BE HELD IN CONTEMPT BY THE DISTRICT COURT FOR NOT PROVIDING LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS WHERE NO PREVIOUS COURT ORDER REQUIRED SUCH ASSISTANCE AND WHERE CONTROLLING COURT OF APPEALS PRECEDENT WITHIN THE CIRCUIT HELD THAT SUCH ASSISTANCE IS NOT CONSTITUTIONALLY REQUIRED?

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PARTIES

Respondents do not dispute the designation of parties.

JURISDICTION

Respondents do not dispute this Court's jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 1977, a civil rights lawsuit was filed in the United States District Court for the Eastern District of Michigan on behalf of all female inmates (Petitioners) incarcerated by Respondents, officials of the Michigan Department of Corrections (MDOC). Subsequently, in 1979 the district court issued an opinion and order finding that educational programs offered women inmates were not equivalent to those offered to male inmates and this lack of parity denied female inmates equal protection. The district court also found that the legal assistance provided by the MDOC to female inmates to insure the free exercise of their right of access to the courts was constitutionally inadequate. Furthermore, to insure that female inmates had access to the courts, the district court ordered MDOC to provide paralegal training to female inmates, to maintain the existing law library and to continue contracting with Prison Legal Services of Michigan, Inc. (PLS). Glover v. Johnson, 478 F. Supp. 1075, 1101 (E.D. Mich. 1979).

PLS is a non-profit independent organization which provides legal services to prisoners. During the mid-1970's, the Young Lawyers Association of the State Bar of Michigan initiated a pilot project to provide legal assistance to male prisoners. Funding was provided by the Young Lawyers Association and the American Bar Association. Funding through MDOC began in 1978 and at the same time, the correctional facility housing female inmates was also included in the contract for legal services. Subsequent to the 1979 order, but independent of it, the primary funding for PLS has been provided by the State of Michigan. PLS and MDOC entered into three contracts between October of 1979 and September of 1982 to provide both male and female prisoners with legal assistance in criminal, civil, and probate matters, including divorce, child custody and neglect actions. (R. 920, 04/04/94 TR. at pp. 55-60.)

After the culmination of extensive negotiations, the district court entered a final order in 1981. The 1981 final order required MDOC to provide paralegal training to interested and qualified inmates, until such time as there

existed a pool of adequately trained female inmate assistants. The purpose of paralegal training was to assure female inmates access to the courts. In the 1981 final order, the district court explained that the objective of the paralegal training program was to provide a pool of adequately trained female inmates who could provide legal assistance to fellow inmates. Glover v. Johnson, 510 F. Supp. 1019, 1023 (E.D. Mich. 1981).

On October 15, 1992, the Court of Appeals decided two consolidated class action lawsuits filed by male inmates in Michigan, both involving access to courts. In Knop v. Johnson and Hadix v. Johnson, 977 F.2d 996 (6th Cir. 1992) cert. den. 507 U.S. 973 (1993), the Court of Appeals held that pursuant to Bounds v. Smith, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), the district court abused its discretion when it ordered MDOC to provide both a constitutionally sufficient law library and a staff of attorneys. "The Director of the Michigan Department of Corrections has not engaged in the sort of contumacious conduct attributed to the North Carolina authorities in the Bounds litigation. Absent such conduct, we see no justification for the federal courts to require the authorities in Michigan to use taxpayer dollars to hire attorneys-at-law for the preparation of prisoner lawsuits." Knop, supra, at 1005. The Court of Appeals also ruled that MDOC was only obligated to provide affirmative legal assistance for prisoners for purposes of pursuing collateral attacks on their convictions and challenging the constitutionality of conditions of their confinement. "As to other types of civil actions, although states may not erect barriers that impede access of incarcerated persons, we held that a requirement of affirmative assistance would be an unwarranted extension of the right of access." Id. at 1008-1009.

Based upon the Court of Appeals' decision in Knop v. Johnson and Hadix v. Johnson, supra, MDOC advised PLS that legal assistance to both male and female inmates in the area of family law must completely end. As a consequence of MDOC informing PLS to end family law legal assistance for inmates, Petitioners filed a "Motion For Injunctive Relief To Compel Compliance With The District Court Orders Regarding Access To Courts And For Contempt Remedies"

on February 25, 1994. (R. 887, Motion.) Respondents filed their response opposing Petitioners' motion on March 29, 1994. (R. 900, Response.) Hearings were held in the district court on April 4, 6, and 12, 1994.

Although during these hearings MDOC repeatedly requested that Petitioners and the district court identify what order(s), if any, were the subject of contempt proceedings, the only order that was discussed was an August 12, 1991 interim order of the district court. (R. 681, Interim Order.) A review of the August 12, 1991 interim order reveals that the only statement concerning PLS is as follows: "IT IS FURTHER ORDERED that pending completion of paralegal training, the development of an adequate pool of writ writers and the demonstration by defendants of the plaintiff class's adequate access to the courts, defendants shall contract with Prison Legal Services forthwith to provide on-site services at all facilities and camps housing women prisoners." Id. at 3. There is absolutely nothing in the August 12, 1991 interim order that requires MDOC to provide affirmative legal assistance to male or female inmates in family law matters. At the conclusion of the proofs, the district court asked for proposed findings of fact and conclusions of law to be made only on the issue involving the injunctive relief. (R. 921, 04/06/94 TR. at pp. 197-198.)

In its April 29, 1994 opinion, the district court determined that MDOC was in contempt of the court's August 12, 1991 interim order. Glover v. Johnson, 850 F. Supp. 592 (E.D. Mich. 1994). (Pet. App. at 11-33.) "Because defendants have not sought modification of my previous orders and unilaterally have eliminated this assistance, they are in contempt. The Interim Order of August 12, 1991, which supplemented my 1979 Opinion and Order, is still in effect." Id. at 594. (Pet. App. at 15.) The district court also ruled that because "maintenance of parenthood is a fundamental constitutional right," MDOC was required to provide affirmative legal assistance to female inmates, but not male inmates, in family law matters. Id. at 595. (Pet. App. at 18.) Although the district court acknowledged that in proceedings for termination of parental rights the law of the State of Michigan already

provided that indigent parents are entitled to counsel, the district court ordered MDOC to provide affirmative legal assistance through PLS. As support for its decision, the district court determined that MDOC's policy of prohibiting prisoners from making direct telephone calls to state courts and agencies, and the fact that these state courts and agencies do not accept collect calls, constituted a barrier to female inmates obtaining access to the courts for purposes of exercising their parental rights. Id. at 597, 600. (Pet. App. at 22.)

As a consequence of the district court's summary finding of contempt without proper foundation, Respondents objected to the proposed order entered on May 6, 1994. Respondents stated in their objections that the proposed order was ambiguous with regard to the exact orders actually subject to contempt, and Respondents also objected that they were instructed only to submit proposed findings of fact and conclusions of law on the injunctive relief requested by Petitioners. (R. 913, Objections.) The district court's May 6, 1994 order enjoined MDOC from failing to provide legal assistance to Petitioners at the staffing levels and in the areas of assistance, including family law matters, which had previously been included in the 1992 contract between MDOC and PLS. The May 6, 1994 order also found MDOC in contempt of the district court's prior orders. (R. 912, Order.) It is from these district court decisions that MDOC appealed to the Court of Appeals.

On February 14, 1996, the Court of Appeals issued an opinion which held that MDOC was not constitutionally required to continue providing legal assistance to Petitioners in family law or child custody matters. Glover v. Johnson, 75 F.3d 264, 269 (6th Cir. 1996). (Pet. App. at 9):

> Thus, as previously noted, it is for the state judges to decide in parental rights cases, even in termination cases, whether counsel is to be appointed for an indigent party in such proceedings. . . .
>
> We conclude that defendants are not constitutionally required to provide plaintiffs free

> legal assistance in parental rights matters, but that such assistance is only required in post-conviction, habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner.

The Court of Appeals also determined that there was no district court order requiring MDOC to fund legal assistance in any particular area of law, and that the district court abused its discretion when it found MDOC in contempt. Id. at 267. (Pet. App. at 3-4.) On March 27, 1996, Petitioners' request for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals. (Pet. App. at 34.)

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS DOES NOT REQUIRE THE MICHIGAN DEPARTMENT OF CORRECTIONS TO PROVIDE LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN FAMILY LAW MATTERS.

This Court has already disposed of the issue presented in the petition for writ of certiorari. In Lewis v. Casey, 518 US ___, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996), this Court was confronted with a class action on behalf of "all adult prisoners" of the Arizona Department of Corrections (ADOC). 135 L. Ed. 2d at 615. In their class action lawsuit, the prisoners alleged that they were deprived of their right of access to the courts in violation of the First, Sixth and Fourteenth Amendments. After a three-month bench trial, the district court determined that there were systemic constitutional violations with numerous issues including ADOC's training of library staff, updating of legal materials and availability of photocopying services. The district court also determined that lockdown prisoners were routinely denied access to the law library and that illiterate or non-English speaking inmates did not receive adequate legal

assistance. After eight months of investigation by a court appointed special master, the district court adopted a twenty-five page injunctive order which mandated sweeping changes with regard to ADOC's prison law libraries and legal assistance programs. Subsequently, the Court of Appeals affirmed the decision of the district court.

This Court reversed the decision of the Court of Appeals. "We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic Bounds violation invalid." 135 L. Ed. 2d at 616 (emphasis added). As support for its decision, this Court noted that Bounds v. Smith, 430 U.S. 817 (1977), did not establish that prisoners have a right to a law library or to legal assistance, but rather, prisoners have a right of access to the courts. "In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." 135 L. Ed. 2d at 617-618.

In addition, this Court clarified that the requirement of showing actual injury is not satisfied by any type of frustrated legal claim, but rather, must involve either: 1) direct appeals from convictions, 2) habeas corpus petitions, or 3) civil rights actions to vindicate fundamental constitutional rights:

> To demand the conferral of such sophisticated legal capacities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires. . . .
>
> In other words, Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it

> requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any <u>other</u> litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

135 L. Ed. 2d 619-620 (Emphasis in original).

Petitioners seek an extremely broad determination of a right to legal assistance in family law matters and their argument hinges on the most severe type of matter, parental rights termination proceedings. Although Petitioners concede that, as a matter of Michigan law, all indigent parents are already entitled to counsel in parental rights termination proceedings, they nevertheless ask this Court to declare that female inmates, but not male inmates, are entitled as a matter of constitutional law to legal assistance in parental rights termination proceedings and other types of family law matters. Petitioners incorrectly contend that MDOC imposes "barriers" to female inmates so they need affirmative legal assistance in order to access their right to court-appointed counsel, but the only "barrier" that Petitioners identify in their petition is that MDOC does not permit inmates to make direct telephone calls and that many state courts and agencies do not accept collect telephone calls. It should be noted that the policy of courts and agencies in the State of Michigan against accepting collect telephone calls is not unique, since Respondents are informed and believe that federal courts also do not accept collect telephone calls from prisoners. In any event, Petitioners failed to produce any evidence that they could not effectively communicate with courts, court personnel or their court-appointed attorneys by use of other methods such as the mail.

Respondents submit that MDOC's telephone policy does not create an unconstitutional impairment of the ability to access the courts. At most it is merely an impairment of a litigating capacity which is "simply one of the incidental (and perfectly constitutional) consequences of conviction

and incarceration." Lewis v Casey, 135 L. Ed. 2d at 620. Since the Petitioners are seeking far more than a right of access to the courts to challenge their convictions or the conditions of their confinement, their claims are not constitutionally protected.

Petitioners have misstated Michigan law regarding the procedures involved in parental rights terminations proceedings. For example, they state that if an incarcerated mother is unable to attend a hearing, she is denied her right to court-appointed counsel (Pet. 21, fn. 26), but they offer no support for this statement, and it is simply incorrect. The mere fact that the right to appointed counsel is triggered by the initiation of court proceedings does not mean that a person is deprived of counsel if she happens not to be present at that time. Michigan statutes and court rules, already provide elaborate safeguards to protect the rights of parents.

Pursuant to statute, all parents, whether incarcerated or not, are informed that they have the right to an attorney at each stage of the parental rights termination proceeding, and if they are indigent, they have the right to a court-appointed attorney. Mich. Comp. Laws 712A.17c(4). Indeed, without respect to the parent's presence in court, Mich. Comp. Laws 712A.17c(5) specifically provides that, "If it appears to the court . . . that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent." Michigan Court Rules also require that the court inform the incarcerated mother of her right to a court-appointed attorney. M.C.R. 5.915(B)(1). In addition, pursuant to court rule, the court may make use of closed circuit television, speaker telephone or other electronic equipment in order to protect the rights of an incarcerated mother. M.C.R. 5.923(D). "In light of present-day telecommunications, other means that fall short of securing the physical presence of a parent are available to ensure that an incarcerated prisoner receives due process at a dispositional hearing." In re Vasquez, 199 Mich. App. 44, 48-49; 501 N.W.2d 231 (1993).

During the hearing before the district court, Petitioners produced one inmate witness who provided testimony concerning her legal problems establishing a guardianship for her daughter. (R. 921, 04-06-94 TR at pp. 118-126.) Petitioners also produced one attorney witness that testified generally concerning the problems faced by other incarcerated mothers trying to establish guardianships for the care of their children. However, Petitioners failed to produce any evidence of "actual injury" to any individual Petitioner's right of access to the courts to challenge their convictions or the conditions of their confinement, much less that there is "widespread actual injury." Lewis v. Casey, supra, 135 L. Ed, 2d at 616.

Defendants submit that pursuant to Lewis v. Casey, this Court should deny the petition for writ of certiorari. The Court of Appeals ruling in this case is entirely consistent with this Court's decision in Lewis v. Casey. "We conclude that defendants are not constitutionally required to provide plaintiffs free legal assistance in parental rights matters, but that such assistance is only required in post-conviction, habeas corpus, and civil rights matters involving the prisoner's custodial situation or constitutional claims personally involving the prisoner." (Pet. App. at 9-10.) Therefore, given that Petitioners have failed to show that the Court of Appeals has decided this case in a way that conflicts with relevant decisions of this Court, the petition for writ of certiorari should be denied.

II.

RESPONDENTS CANNOT BE HELD IN CONTEMPT FOR NOT PROVIDING LEGAL ASSISTANCE EXCLUSIVELY FOR FEMALE INMATES IN STATE-COURT FAMILY LAW MATTERS WHERE NO PREVIOUS COURT ORDER REQUIRED SUCH ASSISTANCE AND CONTROLLING COURT OF APPEALS PRECEDENT WITHIN THE CIRCUIT HELD THAT SUCH ASSISTANCE IS NOT CONSTITUTIONALLY REQUIRED.

Petitioners also argue that the Court of Appeals erred when it determined that the district court's finding of con-

tempt was an abuse of discretion. However, a review of the district court's August 12, 1991 interim order reveals that the court never addressed state funding for legal assistance in any particular area of law. Thus, the Court of Appeals was indisputably correct when it ruled that MDOC had not violated an order of the district court and thus, it could not be held in contempt. N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585, 590-591 (6th Cir. 1987): "The standard requires the petitioner in a civil contempt case to prove by clear and convincing evidence that the respondent violated the court's prior order. . . . A litigant may be held in contempt if his adversary shows by clear and convincing evidence that he violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." Therefore, given that the Court of Appeals correctly determined that the district court abused its discretion when it held Respondents in contempt, the petition for writ of certiorari should be denied.

CONCLUSION

The Sixth Circuit Court of Appeals correctly held that the constitutional right of access to the courts applies only to challenges to convictions and to conditions of confinement and does not require the Respondents to provide legal assistance exclusively to female inmates in parental rights matters. The Sixth Circuit Court of Appeals also correctly determined that the finding of contempt by the district court was an abuse of discretion.

RELIEF SOUGHT

Wherefore, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August, 1996

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MICHIGAN COMPILED LAWS

MCL 712A.17c; MSA 27.3178(598.17c) Proceedings brought under § 712A.1; right to attorney; appointment, waiver, notice, assessment of costs, discharge

Sec. 17c. (1) In a proceeding under section 2(a) or (d) of this chapter, the court shall advise the child that the child has a right to an attorney at each stage of the proceeding.

(2) In a proceeding under section 2(a) or (d) of this chapter, the court shall appoint an attorney to represent the child if 1 or more of the following apply:

(a) The child's parent refuses or fails to appear and participate in the proceedings.

(b) The child's parent is the complainant or victim.

(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.

(d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.

(e) The court determines that the best interests of the child or the public require appointment.

(3) Except as otherwise provided in this subsection, in a proceeding under section 2(a) or (d) of this chapter, the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child's parent or guardian ad litem objects or if the appointment is made pursuant to subsection (2)(e).

(4) In a proceeding under section 2(b) or (c) of this chapter, the court shall advise the respondent at the

respondent's first court appearance of all of the following:

(a) The right to an attorney at each stage of the proceeding.

(b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.

(c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.

(5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.

(6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) or (c) of this chapter, the respondent may waive his or her right to an attorney. A respondent who is a minor may not waive his or her right to an attorney if the respondent's parent or guardian ad litem objects.

(7) In a proceeding under section 2(b) or (c) of this chapter, the court shall appoint an attorney to represent the child. The child shall not waive the assistance of an attorney. The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child. If the child is placed in foster care, the attorney shall, before representing the child in each subsequent proceeding or hearing, review the agency case file and consult with the foster parents and the caseworker.

(8) If an attorney is appointed for a party under this section, the court may enter an order assessing attorney costs against the party or the person responsible for the support of that party. An order assessing attorney costs may be enforced through contempt proceedings.

(9) An attorney appointed by the court under this section shall serve until discharged by the court.

MCL 712A.19b; MSA 27.3178(598.19b) Termination of parental rights; notice, findings; orders

Sec. 19b. (1) Except as provided in subsection (4), if a child remains in foster care in the temporary custody of the court following a review hearing under section 19(3) of this chapter or a permanency planning hearing under section 19a of this chapter or if a child remains in the custody of a guardian or limited guardian, upon petition of the prosecuting attorney, whether or not the prosecuting attorney is representing or acting as legal consultant to the agency or any other party, or of the child, guardian, custodian, concerned person as defined in subsection (6), agency, or the children's ombudsman pursuant to Section 7 of the children's ombudsman act, the court shall hold a hearing to determine if the parental rights to a child should be terminated and, if all parental rights to the child are terminated, the child placed in permanent custody of the court. The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated.

(2) Not less than 14 days before a hearing to determine if the parental rights to a child should be terminated, written notice of the hearing shall be served upon all of the following:

(a) The agency. The agency shall advise the child of the hearing if the child is 11 years of age or older.

(b) The foster parent or custodian of the child.

(c) The child's parents.

(d) If the child has a guardian, the guardian for the child.

(e) If the child has a guardian ad litem, the guardian ad litem for the child.

(f) If tribal affiliation has been determined, the

elected leader of the Indian tribe.

(g) The attorney for the child and the attorneys for all parties.

(h) If the child is 11 years of age or older, the child.

(i) The prosecutor.

(3) The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(a) The child has been deserted under either of the following circumstances:

(*i*) If the parent of a child is unidentifiable and has deserted the child for 28 or more days and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.

(*ii*) The parent of a child has deserted the child for 91 or more days and has not sought custody of the child during that period.

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under either of the following circumstances:

(*i*) A parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(*ii*) A parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

(c) The parent was a respondent in a proceeding

brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will rectified within a reasonable time considering the age of the child.

(*ii*) Other conditions exist that cause the child to come within the jurisdiction of the court, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice, a hearing, and been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

(d) The parent of a child has placed the child in a limited guardianship under section 424a of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.424a of the Michigan Compiled Laws, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 424a of Act No. 642 of the Public Acts of 1978 regarding the child to the extent that such noncompliance has resulted in a disruption of the parent child relationship.

(e) The parent of a child who has a guardian under the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.1 to 700.993 of the Michigan Compiled Laws, has substantially failed, without good cause, to comply with a court-structured plan described in section 424b or 424c of Act No. 642 of the Public Acts of 1978, being sections 700.424b and 700.424c of the Michigan Compiled Laws, regarding the child to the extent that such noncompliance has resulted in a disruption of the parent-child relationship.

(f) The child has a guardian under the revised probate code, Act No. 642 of the Public Acts of 1978, *** and both of the following have occurred:

(*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child.

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(4) If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing.

(5) If the court finds that there are grounds for

termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent shall not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

(6) As used in this section, "concerned person" means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g) and who has contacted the department of social services, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.

MICHIGAN COURT RULES

MCR 5.915
ASSISTANCE OF ATTORNEY

(A) **Delinquency Proceedings.**

(1) *Advice*. If the juvenile is not represented by an attorney, the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar, including trial, plea of admission, and disposition.

(2) *Appointment of an Attorney*. The court shall appoint an attorney to represent the juvenile in a delinquency proceeding if:

(a) the parent refuses or fails to appear and participate in the proceedings,

(b) the parent is the complainant or victim,

(c) the juvenile and those responsible for the support of the juvenile are found financially unable to retain an attorney and the juvenile does not waive an attorney,

(d) those responsible for the support of the juvenile refuse or neglect to retain an attorney for the juvenile and the juvenile does not waive an attorney, or

(e) the court determines that the best interests of the juvenile or the public require appointment.

(3) *Waiver of Attorney.* The juvenile may waive the assistance of an attorney except where a parent or guardian ad litem objects or when the appointment is based on subrule (A)(2)(e). The waiver by a juvenile must be made in open court to the judge or referee, who shall find and place on the record that the waiver was voluntarily and understandingly made.

(B) **Child Protective Proceedings.**

(1) *Respondent.*

(a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that

(i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and,

(ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any later hearing.

(b) When it appears to the curt, following an examination of the record, through written financial statements, or through other means that the respondent is financially unable to retain an attorney and the respondent desires an attorney, the court shall appoint one to represent the respondent at any hearing conducted pursuant to these rules.

(c) The respondent may waive the right to an attorney, except that the court shall not accept the waiver by a respondent who is minor when a parent or guardian ad

litem objects to the waiver.

(2) *Child.* The court must appoint an attorney to represent the child at every hearing. The child may not waive the assistance of an attorney. The appointed attorney shall observe and, dependent upon the child's age and capability, interview the child. If the child is placed in foster care, the attorney shall, before representing the child in each proceeding or hearing subsequent to a preliminary hearing or emergency removal hearing, review the agency case file and consult with the foster parents and the caseworker.

(C) **Appearance.** The appearance of an attorney is governed by MCR 2.117(B).

(D) **Costs.** When an attorney is appointed for a party under this rule, the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party, which order may be enforced through contempt proceedings.

(E) **Discharge.** An attorney appointed by the court to represent a party shall serve until discharged by the court.

MCR 5.923
MISCELLANEOUS HEARING PROCEDURES

(A) **Additional Evidence.** If at any time the court believes that the evidence has not been fully developed, it may

(1) examine a witness,

(2) call a witness, or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence.

(B) **Examination or Evaluation**. The court may order that a minor or parent be examined or evaluated by a physician, dentist, psychologist, or psychiatrist.

(C) **Fingerprinting and Photographing**. The court may permit fingerprinting or photographing or both of a minor when the minor is in court custody. Fingerprints and photographs must be placed in the confidential files, capable of being located and destroyed on court order.

(D) **Electronic Equipment; Support Person**. The court may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties. The court may allow the use of videotaped statements and depositions, anatomical dolls, support persons, and take other measures to protect the child witness as authorized by, and enumerated in, 1987 PA 45, MCL 712A.17b; MSA 27.3178(598.17b).

(E) **Impartial Questioner**. The court may appoint an impartial psychologist or psychiatrist to ask questions of a child witness at a hearing.